

EXECUTIVE ORDER NO. 2011 – (3)

WHEREAS, the governing authorities of the City of Jackson, Mississippi (“City of Jackson”), have expressed their desire to encourage disadvantaged business enterprises; and

WHEREAS, the governing authorities of the City of Jackson desire to create jobs for citizens of the City of Jackson; and

WHEREAS, the recirculation of taxpayer dollars within the City of Jackson will promote economic and social stability; and

WHEREAS, the following are bases for the need of equal business opportunities for employment and contractual services in the City of Jackson:

- (1) Historical, systemic and institutionalized discrimination against minority and women owned businesses exists in the Jackson business sector, which has restricted their access to private and public contracting markets and which has emerged as the major factor responsible for their marginal economic position in the Jackson business population.
- (2) The specific industries that showed discrimination against women and other minorities include construction, commodity sales, and professional services.
- (3) The contracting and procurement practices of the City of Jackson, prior to the inception of a minority and female business enterprise program, were dominated by an historical, institutional and systematic network from which women and minorities were excluded.
- (4) Market place discrimination against minorities and women business owners occurred in the Jackson marketplace across a wide range of businesses, including evidence of double standards in work appraisals, denials of opportunities to bid, discrimination in bonding, financing and in payments, lack of access to contracts, unnecessarily restrictive specifications, the existence of and the exclusion from the historical, systematic, and institutional network, subcontracting, bid shopping, and bid manipulation.
- (5) The statistical comparison suggested by the U.S. Supreme Court in Croson, between the number of available qualified minority businesses, and the total contract dollar awards going to minority businesses, referred to as the Utilization Percentage Ratio (UPR), yields significant statistical disparities in all industries between majority and minority businesses who contract with the City of Jackson. Moreover, this comparison suggested by the court, although showing a significant degree of disparity, results in a deficient measure of discrimination, failing to take into account those minority or female individuals or firms who were discouraged, deterred and/or disadvantaged by the discriminating practice in the marketplace.
- (6) Race and gender neutral policies, including those suggested by the U.S. Supreme Court in Croson, although helpful in improving minority and women owned business development, are found to be inadequate standing alone to eliminate discriminatory practices which continue to deny women and minority business owners access to public and private contracts in the Jackson marketplace.

- (7) Women and minorities have been discriminated against in public and private markets for contractual services. There is a presence of discrimination in Jackson in various industry classifications and by employer status which has persisted over time. Moreover, there is strong anecdotal and statistical evidence that African American businesses continue to suffer the effects of past and present discrimination in the Jackson business markets both public and private.
- (8) Female, African American, and other minority owned businesses continue to suffer discrimination in the local business market when competing for construction contracts. Given the strikingly low participation of minority enterprise in private construction markets, the City of Jackson should leverage behavior in the private market to assure the effective development of minority and female business enterprises and to eradicate discriminatory practices.
- (9) The City of Jackson was a passive participant in discriminatory practices in both public and the private commercial markets.
- (10) Past and present discrimination in public and private markets for contractual services and the inability of race and gender-conscious programs standing alone, make race and gender-conscious programs necessary in order to remedy economic disparities between minority, female and majority contractors.
- (11) Utilization goals, attainable by good faith efforts, not quotas, for African-American, Female, Hispanic, and Asian American owned businesses are necessary to mitigate the competitive disadvantages which are caused by discrimination and are justified by evidence in the record, as well as to re-circulate revenue back into the community.

I, **Harvey Johnson, Jr., Mayor of the City of Jackson, Mississippi**, hereby order that the following policy be followed with regard to equal business opportunities for employment or contractual services with the City for various projects:

Definitions.

For the purposes of this Order, the following terms shall have the following meanings:

- (1) "African American" shall mean "black".
- (2) "African American Business Enterprise (AABE)" shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, as defined in this Order, and is owned and controlled by one or more African Americans and certified as such by the division of business development.
- (3) "Asian American Business Enterprise (ABE)" shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, as defined in this Order, and is owned and controlled by one or more Asian Americans and certified as such by the division of business development.
- (4) "Bid" shall mean and include a quotation, proposal, or offer by a bidder or contractor to perform, or provide labor, materials, supplies or services to the City of Jackson for a price.
- (5) "Bidder" shall mean any person, partnership, corporation or other business that submits a quotation, bid, offer or proposal to provide labor, materials, supplies or services to the City of Jackson for a price.
- (6) "Certified African-American Business Enterprise (AABE), Hispanic Business Enterprise (HBE), Asian Business Enterprise (ABE), Minority Business Enterprise (MBE) or Female

- Business Enterprise (FBE)" shall mean an AABE, HBE, ABE, MBE or FBE which meets the requirements of this Order, and has been approved by the division of business development.
- (7) "Commercially useful function" shall mean the performance of real and actual services in the discharge of any contractual endeavor. The contractor must perform a distinct element of work in which the business has the skill and expertise as well as the responsibility of actually performing, managing and supervising.
- (8) "Controlled", for purposes of determining whether a business is a minority business enterprise or female business enterprise, shall mean the minority or the female owner(s) shall: (a) possess and exercise the legal authority and power to manage business assets, good will and daily operations of the business; and (b) actively and continuously exercise such managerial authority and power in determining the policies and directing the operations of the business. If the owners who are not minorities or females are disproportionately responsible for the operation of the business, then the business is not controlled by minorities or females.
- (9) "Eligible project" shall mean:
- a. Any city construction contract over \$50,000.00, except sole source procurements.
 - b. Any city non-construction contract or procurement, except sole source procurements.
- (10) "Female business enterprise (FBE)" shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, as defined in this Order, and is owned and controlled by one or more females and certified as such by the division of business development.
- (11) "Hispanic business enterprise (HBE)" shall mean a business which is an independent and continuing enterprise for profit performing a commercially useful function, as defined in this Order, and is owned and controlled by one or more Hispanics and certified as such by the division of business development.
- (12) "Joint venture" shall mean an association of two or more persons, partnerships, corporations or any combination of them, established 'to carry on a single business activity which is limited in scope and duration. The degree to which a joint venture may satisfy relevant equal business opportunity (EBO) goals cannot exceed the proportionate interest of the MBE or FBE held as a member of the joint venture in the work to be performed. The agreement establishing the joint venture, partnership or other multi-entity relationship shall be in writing. Further, MBE or FBE participation in a joint venture shall be based on the sharing of real economic interest in the venture and shall include proportionate control over management, interest in capital acquired by the joint venture, and interest in earnings.
- (13) "Minority business enterprise (MBE)" shall mean a business which is an independent and continuing operation for profit, performing a commercially useful function, as defined in this Order, and is owned and controlled by one or more minority group members, as defined in this Order, such groups having been determined to have suffered discrimination requiring amelioration and the owners are certified as such by the city.
- (14) "Owned", for purposes of determining whether a business is a minority business enterprise or female business enterprise shall mean that:
- a. The minority or female owner(s) as the context requires, shall possess an ownership interest of at least 51 percent of the business;
 - b. Such ownership shall be real and continuing, and shall go beyond the mere indicia of ownership of the business reflected in the ownership documents; and
 - c. The minority or female owner(s) shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance, rather than the form of ownership arrangements.
- (15) "Small business enterprise (SBE)" shall mean a business which is an independent and

continuing enterprise for profit, performing a commercially useful function, as defined in this Order, and is owned and controlled by one or more persons, not limited to members of minority groups, who have been historically deprived of the opportunity to develop and maintain a competitive position in the economy because of social and economic disadvantages and certified as such by the division of business development in accordance with current federal regulations.

- (16) "Supplier" shall mean a warehouser or manufacturer of materials, supplies or equipment which contracts directly with a bidder to provide such materials, supplies or equipment on a project which involves a trade or service within the procurement category or categories of professional services, construction, or commodities (goods and non-professional services).
- (17) "Bidder" shall include any person or company (contractor, proposer, or offeror) that provides a bid, proposal or offer in response to a procurement solicitation for a potential contract with the City of Jackson.

Statement of policy.

It is the policy of the City of Jackson to promote full and equal business opportunity for all persons doing business with the City of Jackson. The City has found that female, African American, Hispanic, and Asian American owned businesses have suffered the effects of racial and gender discrimination in both public and private markets, resulting in a disproportionate award of contract dollars to non-minority or non-female businesses. Further, the demographics of the metropolitan area have shifted wherein many businesses have moved to neighboring cities. The effect has been a reduction in tax revenue, which negatively impacts the City's ability to fund municipal operations, repair and maintain infrastructure, and provide public safety. The purpose, therefore, of the equal business opportunity program is to abate the effects of the past and present discrimination against minority and female businesses so that, regardless of race or gender, each business will become as institutionalized in the City of Jackson as elsewhere.

Application

The provisions set forth herein shall apply to all eligible projects as defined above.

Divisions created within the office of economic development.

That in addition to any existing divisions within the office of economic development, there shall be created two divisions which shall be known as:

- (1) The division of equal business opportunity; and
- (2) The division of business development

That in addition to other duties as may be required by the deputy director of the office of economic development, these two divisions are created to monitor and administer enforcement of this Order.

Duties of the Equal Business Opportunity Officer

The Equal Business Opportunity Officer within the Division of equal Business Opportunity shall have the following authority and duties:

- (1) Administer and enforce this ordinance;
- (2) Establish written procedures, guidelines and forms as may be necessary to effectuate this ordinance, subject to the approval of the EBORC.
- (3) Prepare written documentations, with reasons therefore, of whether potential contractors are in compliance with this Ordinance, in accordance with the procedures recommended by the EBORC.
- (4) Attend pre-bid, pre-bid, pre-proposal, pre-contract, pre-construction conferences and project close-out meetings with potential contractors and subcontractors, for the purpose of ensuring that said office has all available information with which to make a determination of compliance;
- (5) Investigate alleged violations of this ordinance, and issue written determinations following said investigations, stating the reasons therefore and any penalty or penalties to be imposed;
- (6) Provide all forms, applications, documents and papers necessary to comply with this ordinance to business entities of all types;
- (7) Determine whether any of the penalties set forth hereunder in Section 127-19, Failure To Meet Equal Business Opportunity Participation Goals, are appropriate;
- (8) Notify an affected party by certified mail that it has the right to appeal a determination of noncompliance with this article to the Deputy Director of the Office of Economic Development as provided in Section 127-21, Appeals, within seven (7) days of receipt of the notice of noncompliance.
- (9) Recommended to the Equal Business Opportunity Review Committee (EBORC) further efforts needed to ensure participation;
- (10) Notify the EBORC of any determination of noncompliance with the requirements of this article and any appeal from such determination of noncompliance.
- (11) Prepare quarterly written reports of the EBORC;
- (12) Acts as the staff support person to the EBORC; and
- (13) Implement the provisions of this Order, as regard review of bid or offer.

Duties of the Manager of the Division of Business Development

The Manager of the Division of Business Development of the Office of Economic Development shall have the following authority and duties:

- (1) Develop a database of certified MBEs and FBEs to be maintained as a public record;

- (2) Maintain annual statistical data on availability and utilization of certified MBEs (AABEs, HBEs, of ABEs(and FBEs including:
 - (a) The level of EBO participation achieved in the contracts subject to this Ordinance; and
 - (b) The current estimated availability of AABEs, HBEs, ABDs and FBEs to perform contracts; and
 - (c) An assessment of the continuing need for EBO goals for specific projects.
- (3) Administer a Business Assistance Program, responsible for providing business counseling and technical assistance to MBEs and FBEs as well as provide referral services to other service providers who can offer special types of assistance to MBEs and FBEs;
- (4) Coordinate, oversee and/or administer a partnership arrangement with a Small Business Development Center;
- (5) Review cases where contractors fail to implement previously made MBE or FBE commitments to determine whether there should be further efforts or alternative approaches, including but not limited to, contact and industry, or any pertinent federal agency, for information concerning the availability of qualified MBEs and FBEs;
- (6) Certify contractor, bidders or offertory as bona fide MBEs (AABEs, HBEs, or ABEs) or FBEs, in accordance with the standard set forth in this Ordinance;
- (7) Notify an affected party by certified mail that it is the right to appeal a denial of certification as an MBE (AABE, HBE, or ABE) or FBE to the Deputy Director of the Office of Economic Development as provided in this Order, Appeals, within seven (7) days of receipt of the notice of non-certification; and
- (8) Notify the EBORC of any determination of non-certification with the requirements of this Ordinance or and any appeal from such determination of non-certification.

Equal business opportunity review committee (EBORC).

- (a) The equal business opportunity review committee is comprised of: a designee of the mayor's office; the office of the city attorney or his designee; the chief administrative officer or his designee; the director of the department of public works or his designee; the purchasing manager or his designee; and the director of the department of planning and development or his designee. This is inclusive of all voting members of the equal business opportunity review committee. The deputy director of the office of economic development shall serve as the chairperson of the EBORC, but will be a nonvoting member of the committee. The Business Development Manager or his designee and the EBO Officer or his designee shall serve as staff and/or liaison to the committee.
- (b) The equal business opportunity review committee shall have the following authority and duties:

- (1) The quarterly review of reports of the equal business opportunity officer;
- (2) The annual review, assessments and revision of equal business opportunity participation goals.
- (3) The appellate review of noncompliance with the provisions of this Order by a bidder or denial of certification of an MBE or FBE.

Equal business opportunity participation goals.

In fulfillment of the policy to promote equal business opportunity for contracting and procurement with the City of Jackson, and based upon the findings of the Council, as established by the Griffin-Strong Report, by the public hearings on discrimination in the Jackson business sector, and by all other evidence of record, the City of Jackson shall establish Equal Business Opportunity participation goals for African American Businesses Enterprises (AABEs), Female Business Enterprises (FBEs), Hispanic Business Enterprises (HBEs), and Asian American Business Enterprises (ABEs).

The Equal Business Opportunity (EBO) participation goals shall be:

Procurement Category	Asian (ABE)	African American (AABE)	Hispanic (HBE)	Native American (NABE)	Female (FBE)
Architecture/Engineering & Professional Services	0.16	8.67	0.00	0.00	1.96
Construction	0.00	12.41	0.37	0.00	4.89
Goods (Commodities)& Non-Professional Services	0.04	6.78	0.02	0.00	3.03

Alternative project participation goals.

- (a) The applicability of the adopted EBO participation goals to any specific project shall be evaluated by the equal business opportunity officer. If the goal is not appropriate for a specific project, the equal business opportunity officer shall set an appropriate alternative project goal for said project. In determining the project goal on a particular project, the equal business opportunity officer shall consider: (a) the availability of AABEs, FBEs, HBEs, and ABEs in various industry classifications and professions which are ready, willing and able to provide goods and services on the particular contract, as identified in the city's certification database; (b) the level of participation by such firms in past contracts awarded by the City of Jackson; (c) the contract specifications; (d) whether the vendor is located in the city limits of Jackson; (e) how many residents of Jackson does the vendor employ; and (f) any other relevant factors. To set a project goal, there must be at least one available AABE, FBE, HBE, or ABE for each specific goal. Further, the vendor shall provide documentation to the EBO Officer showing in specific detail what minority businesses were researched, along with negotiations with the same.
- (b) The alternative goal established on each contract shall be reviewed by the equal business opportunity review committee (EBORC). The alternative goal or waiver established by the EBORC shall be reported to the mayor and the city council upon presentation of each to the city council for approval. The EBORC shall review each contract where an alternative goal(s) is

applied to a project and approve or reject such alternative project goal. In reviewing the goals on each project, the EBORC shall consider the availability and utilization data by which each alternative goal was calculated.

- (c) Monthly, the equal business opportunity officer shall review MBE (AABE, ABE, or HBE) and FBE participation on all contracts and procurements to evaluate the results of the EBO goal program. Said report shall be reviewed by the EBORC and submitted to the mayor or his designee.

Contractor's requirements regarding submission of an equal business opportunity plan.

Each bidder shall submit with each bid submission on a city contract for an eligible project a completed and signed equal business opportunity (EBO) plan, on a form approved and provided by the division of equal business opportunity. This form shall be included as part of any solicitation document for an eligible project, as defined in this Order.

Notwithstanding its compliance with any other requirement of city ordinances, no bidder shall be awarded an eligible contract unless an equal business opportunity (EBO) plan is submitted with the bid submission and the equal business opportunity officer has approved. Such equal business opportunity (EBO) plan or granted a waiver on the project; or unless the bidder has been determined in compliance with the ordinance by a final appellate determination of the EBORC. Such EBO plan shall be designed to meet the applicable project goals set for such project and shall be incorporated into the contract, under the provisions of this Order.

- (1) Equal business opportunity (EBO) plan. As a precondition to selection, each bidder shall submit a completed and signed EBO plan with the bid submission which lists the name, address, telephone number, electronic mail address and contact person of each subcontractor or supplier to be used in the contract, the type and scope of work or service each business will perform, the dollar value of the work, the ownership of each business by race and/or gender, and, if applicable, the AABE, HBE, ABE, NABE or FBE certification number of each business that has been contacted by such bidder, and has agreed to be used in the contract. Where bidders include names of MBEs (AABE, HBE, ABE, NABE) or FBEs on their EBO Plan and it is established that these entities were in fact not contacted or have been included without their permission, it shall be considered a fraudulent submission and grounds for rejecting the bid submission, in accordance with this Order.

Contractors may employ AABEs, HBES, ABES, or FBEs to meet the applicable project goals through a variety of methods, as follows:

a. Subcontractor participation:

- (1) Where a prime contractor utilizes one or more subcontractors to satisfy its equal business opportunity commitment, the prime contractor may count toward its EBO plan only expenditures to MBE (AABE, HBE, or ABE) or FBE contractors that perform a commercially useful function in the work of the contract.
- (2) An MBE or FBE subcontractor is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing and supervising the work involved. In determining whether an MBE or FBE subcontractor, is performing a commercially useful function, factors, including but not limited to the following, will be considered:

- i. The amount of work subcontracted;
 - ii. The type of prime contract;
 - iii. Whether the business has the skill and expertise to perform work for which it has been certified;
 - iv. Whether the business actually performs, manages and supervises the work for which it has been certified;
 - v. Whether the business purchases goods and/or services from a non-minority/women's business enterprise and simply resells goods to the city, city contractor, or other person doing business with the city for the purpose of allowing those goods to be counted towards fulfillment of minority/women's business enterprise utilization goals; and
 - vi. Standard industry practices.
- (3) Consistent with standard industry practices, an MBE or FBE subcontractor may enter into second tier subcontracts. In the event an MBE or FBE subcontractor subcontracts a significantly greater portion of the work of its subcontract to a non-minority, non-female owned firm than would be expected on the basis of standard industry practices, the MBE or FBE subcontractor shall be presumed not to be performing a commercially useful function.

b. Supplier participation:

Where a prime contractor utilizes one or more suppliers to satisfy its EBO commitment, in whole or in part, the MBE or FBE supplier participation may be credited towards the applicable goal as follows:

- (1) For the purposes of calculating the percentage of total contract dollars awarded or paid to MBE or FBE suppliers, only amounts paid to MBE and FBE suppliers who manufacture the goods supplied, who are wholesalers warehousing the goods supplied, or who are manufacturer's representatives (distributors) of goods customarily and ordinarily used based upon standard industry trade practices shall be counted. MBE and FBE suppliers, as defined in this Order, must be certified to provide contracted supplies with both the Business Development Division and the Purchasing Division of the City of Jackson.
- (2) For those contracts where an extraordinarily large proportion of the contract price is for equipment or supplies, the EBO officer with the approval of the EBORC, may set a lower project goal than otherwise would be required.

c. Joint ventures:

- (1) The division of equal business opportunity shall determine on a project-by-project basis, where economically feasible, whether the establishment of joint ventures is necessary to ensure prime contracting opportunities for African American, Hispanic, Asian American, Native American and female business enterprises on all eligible projects over \$50,000.00. Joint venture between all prime contractors and MBEs and FBEs shall be required on all projects exceeding \$10,000,000.00, even if the prime itself is an MBE or FBE, except where a significantly large portion of the contract is for the purchase of equipment or supplies. For projects that exceed \$10,000,000.00, the joint venture agreement must be submitted at the time of bid.
- (2) Where a contractor engages in a joint venture to satisfy its equal business opportunity commitment, the EBORC, prior to the award of a contract on an eligible project, will review all contractual agreements regarding:
 - i. The initial capital investment of each venture partner;
 - ii. The proportional allocation of profits and losses to each venture partner;
 - iii. The sharing of the right to control the ownership and management of the joint venture;

- iv. The actual participation of the venture partners in the performance of the contract;
 - v. The method of and responsibility for accounting;
 - vi. The methods by which disputes are resolved; and
 - vii. Any additional information required by the EBO officer.
- (3) On the basis of the factors delineated in this Order, the equal business opportunity officer shall determine the degree of AABE, HBE, ABE, or FBE participation resulting from the joint venture which may be credited towards the applicable EBO goals of the project.
 - (4) The bidder shall provide the equal business opportunity officer access to review all records pertaining to joint venture agreements before and after the award of a contract in order to reasonably assess compliance with this Order.

d. Mentor protege programs:

- (1) The division of equal business opportunity also encourages mentor protege programs to assist African American, Hispanic, Asian American, and female business enterprises in financing, bonding, construction management and technical assistance. Mentor-protege agreements will be reviewed by the equal business opportunity officer for final approval of the following terms of each agreement:
 - i. Type of technical assistance to be provided by mentor;
 - ii. Rights and responsibilities of each mentor and protege contracting activity;
 - iii. The specific duration of the agreement;
 - iv. The mentor protege relationship shall continue, at a minimum, for the duration of the project;
 - v. The amount of participation by the protege which may be credited toward the applicable EBO goal.
- (2) During the term of the contract the mentor and protege businesses must each provide to the EBO officer a quarterly summary of the mentor skills provided to the protege, which shall include:
 - i. The time spent between mentor and protege businesses in furtherance of the mentor protege relationship;
 - ii. The nature and extent of managerial, technical, financial and/or bonding assistance provided;
 - iii. A summary and explanation of any projects bid on or undertaken by the mentor-protege team in the private sector or for a governmental entity other than the City of Jackson; and
 - iv. Any additional or further information required by the EBO officer as set forth in bid documents or otherwise.

e. Mediation of disputes between joint venture or mentor-protege team members:

- (1) If, after the award of a contract to a joint venture of mentor-protege team, any member of the joint venture or mentor-protege team believes that the terms and conditions of the agreement as approved by the EBO officer have not been complied with, then such member may seek review and mediation of such agreement before the EBORC. The request for review must be made in writing.
- (2) Within 20 calendar days of receipt of a request for review, if the dispute has not already been resolved informally among the parties, the EBORC shall set a meditation date, and the EBO officer shall provide written notice of the mediation date to each member of the joint venture or mentor-protege team.

- (3) The EBORC shall have authority to make recommendations and resolve issues in dispute.
- (4) The EBORC's response to all disputes must be provided in writing to the members of the joint venture or mentor-protege team within 20 calendar days after completion of mediation.
- (5) With the consent of the parties to the dispute, the EBORC shall have the option of referring mediation proceedings to a qualified outside mediator.

Waiver. If the EBO plan does not meet the project goals, the bidder must seek a partial or total waiver of the project goals. The request for waiver of all or part of the project goals shall include full documentary evidence of the bidder's good faith outreach efforts to meet the project goals and an explanation as to why the request for waiver should be granted. The request for a waiver shall be in writing and submitted at the time of bid as a part of the bidder's EBO plan. It should include a signed narrative, and written documentation demonstrating the bidder's good faith outreach efforts to identify, contact, contract with or utilize certified MBEs and FBEs as subcontractors or suppliers, or in a joint venture or mentor-protege relationship which verify the good faith outreach efforts taken by the bidder to meet the goals. To obtain a full waiver, an applicant must exceed what is required above, such that it satisfies the requirements of this Executive Order as a whole.

Replacement. If an MBE/FBE subcontractor cannot perform satisfactorily, the contractor shall take all necessary reasonable steps to replace the subcontractor with another MBE/FBE contractor. All MBE/FBE replacements must be approved by the EBORC. To demonstrate necessary reasonable efforts to replace any subcontractor that is unable to perform successfully, the contractor must document steps taken to subcontract with another MBE/FBE contractor.

Good faith outreach efforts. No bidder shall be granted a waiver on an eligible project unless the EBORC determines that the bidder has satisfied the good faith outreach efforts requirements of this paragraph on such eligible project. The bidder shall provide documentation of all of the following as evidence of its good faith outreach efforts. The following documents shall be included as part of the EBO plan at the time of bid, and each bidder will be evaluated on the same:

- a. Bidder contacted the business development division to identify certified MBEs and FBEs available to work on the project.
- b. Copies of written notification to MBEs and FBEs that their interest in the subcontract is solicited. Such notices and invitations shall include a full disclosure of the criteria upon which bids, proposals or quotes will be evaluated, and also include contact information for inquiries, submissions, or requests to review any necessary bid documents.
- c. Bidder shall provide documentation verifying receipt of the solicitation notice by the MBEs and/or FBEs.
- d. Bidder placed notices of opportunities for qualified businesses to perform subcontracting work on the eligible project in newspapers, trade journals, and other relevant publications, including publications specifically targeted to MBEs and FBEs or communicated such notices of opportunities via the internet or by other available media or means.
- e. Evidence of efforts made to divide the work into economically feasible segments in order to allow for the greatest opportunity for participation by MBEs and FBEs and in order to increase the likelihood of achieving the stated goals;
- f. Evidence of efforts made to negotiate with MBEs and FBEs, including, at a minimum:
 - (1) The names, addresses and telephone numbers of the MBEs and FBEs who were contacted;
 - (2) A description of the information provided to MBEs and FBEs regarding the plans and specifications for portions of the work to be performed; and

- (3) For each business which contacted or was contacted by the bidder regarding subcontracting or services on the eligible project, but was not contracted with or otherwise utilized on the eligible project, the bidder shall provide a written statement setting forth the dates of such contacts, the nature of such contacts, and the reasons why an agreement was not reached regarding work to be performed on the project. The bidder shall maintain all written documents reflecting such contacts, including bids, quotes and proposals.
- g. Evidence that the bidder promptly responded to inquiries, provided necessary physical access and time for interested businesses to fully review all necessary bid documents, and otherwise provided information, access and time necessary to allow all interested business to prepare bids and quotes.
- h. Evidence of efforts made to assist the MBEs and FBEs contacted in obtaining bonding and insurance which the bidder requires;
- i. A written statement of the reasons for the bidder's conclusion regarding each MBE and FBE contacted which the bidder considered not to be qualified;
- j. Written quotes solicited from all MBEs or FBEs seeking subcontract work with the bidder at the time of the bidding; and
- k. A statement with supporting documents and affidavits evidencing whether the bidder has used MBE and/or FBE contractors as joint venture partners, subcontractors, suppliers or in a mentor-protégé relationship in past or present private sector contracts in Jackson.
- l. Specific and continuing personal (both written and oral) recruitment efforts directed at MBE and FBE contractor organizations and/or MBE and FBE assistance organizations.
- m. Increasing, where possible, the number of aggregate purchase items so as to eliminate the requirement of front-end purchases of material for as many MBE and FBE subcontractors as possible.

Review of bid or offer submission.

- (a) The equal business opportunity officer shall review each bid or offer on a contract to determine if the bidder included in its submission a completed and signed EBO plan, which meets the EBO goals for said contract, and approve or reject said plan. No bidder shall be awarded an eligible project unless an EBO plan is submitted with its bid submission. No contract on eligible project shall be executed unless the recommended bidder has submitted an EBO plan for such eligible project.
- (b) Where a partial or total request for waiver of a project goal is made, the EBORC shall determine whether a bidder has met the good faith outreach efforts requirement in an effort to meet the project goals and whether a total or partial waiver of a project goal should be granted. In reviewing the EBO plan submitted by a Bidder to determine whether the bidder has satisfied the good faith outreach efforts requirements of this paragraph, the EBORC will consider, among other things, the total project dollars subcontracted to or expended for services performed by other businesses, including certified MBEs and FBEs, whether such businesses perform commercially useful functions in the work of the contract based upon standard industry trade practices, whether any amounts paid to supplier businesses are for goods customarily and ordinarily used based upon standard industry trade practices, and the availability of certified MBEs and FBEs for such eligible project.
- (c) Any partial waiver granted by the EBORC shall specify the amount to which the applicable goal has been reduced on the contract.
- (d) In cases where a waiver is requested alleging the unavailability of MBEs or FBEs to deliver the specified goods and services, the equal business opportunity officer shall certify that AABEs,

HBEs, ABEs, or FBEs are not in fact available to provide the needed goods or services at competitive prices.

- (e) The equal business opportunity officer may declare the bid or offer non-responsive where it is determined that a bidder: (a) failed to provide a completed and signed EBO plan; (b) failed to identify the AABEs, HBEs, ABEs, or FBEs by name, scope of work and dollar value of work in their bids or proposals sufficient to meet the applicable EBO goals for that project; (c) failed to achieve the dollar value of creditable participation by certified MBEs or FBEs necessary to meet the EBO project goals as evaluated by the equal business opportunity officer; or (d) fails to meet the requirements for a total or partial waiver of the EBO goals.
- (f) In the event the equal business opportunity officer determines that the EBO plan submitted by a bidder is false or fraudulent, subject to the approval of the EBORC, the equal business opportunity officer shall be authorized to reject the bid or offer, or if the determination is made after an award, the contract may be declared null and void and canceled.
- (g) Any project over \$10,000,000.00 shall be brought to the EBORC for review and approval.

Graduation exemption from goals participation.

- (a) Certified AABEs, HBEs, ABEs, or FBEs shall be deemed graduated from being utilized to fulfill EBO participation goals, where records show from federal or state income tax returns that any AABE, HBE, ABE, or FBE has maintained gross receipts for two consecutive years that are in excess of the average gross receipts or other indicia of income of those non-minority firms with the largest market shares which represent 50 percent of the industry sales among the firms in the same industry classification.
- (b) Firms which have achieved the average gross receipts in their industry specified above will be presumed to have reached a competitive status in overcoming the effects of discrimination.

Incorporating the equal business opportunity clause in contracts for eligible projects.

All contracts for eligible projects entered into by the city shall incorporate the EBO clause as delineated in this Order. This requirement shall be considered to have been complied with when such quoted EBO clause is set forth in an exhibit attached to the contract and appropriate language incorporating into said exhibit into the contract is set forth in the contract.

Equal business opportunity clause.

The equal business opportunity clause shall read as follows:

"The contractor agrees to make good faith outreach efforts to meet the goals of this agreement by making available opportunities for MBEs (AABEs, HBEs, and ABEs) and FBEs for utilization in the work set forth within this agreement, as Exhibit A, hereby incorporated in the agreement in accordance with the provisions of this Order and shall take the following actions as part of its good faith outreach efforts to effectuate the provisions of this Order:

- (1) Notification to MBEs and FBEs that the contractor has subcontracting opportunities available and maintenance of records of the MBEs and FBEs responses.
- (2) Maintenance by the contractor of a file of the names and addresses of each MBE and FBE contacted and action taken with respect to each such contact.

- (3) Dissemination of the contractor's EBO policy externally by informing and discussing it with all management and technical assistance sources; by advertising in news and electronic media and by notifying and discussing it with all subcontractors and suppliers.
- (4) Specific and continuing personal (both written and oral) recruitment efforts directed at MBE and FBE contractor organizations and/or MBE and FBE assistance organizations.
- (5) Subdivision of the contract into economically feasible segments as practice to allow the greatest opportunity for participation by MBEs and FBEs.
- (6) Increasing where possible the number of aggregate purchase items so as to eliminate the requirement of front-end purchases of material for as many MBE and FBE subcontractors as possible.
- (7) Adoption of the equal business opportunity plan submitted with its response to the invitation for bids or request for proposals obligations under this agreement, as approved by the equal business opportunity officer.
- (8) Submission of monthly reports on the forms and to the extent required by the equal business opportunity officer, to be due on the tenth day of each month following the award of the work set forth in this agreement.

Maintenance of records and reports by contractors.

Contractors awarded eligible projects incorporating EBO requirements must submit monthly participation reports on a form provided by the equal business opportunity officer. This report shall be submitted to the equal business opportunity officer on the tenth day of each month following the award of the eligible project. Each report shall include, among other information, the name, address, telephone number and contact person of each subcontractor or other business used to date, the type of work or service each business has performed, and summary of the number and dollar amounts contracted to or committed to each business during the term the contract, the dollar amounts actually paid to each business during the current month, the total dollar amounts actually paid to each business by race or gender (denoted as either AABE, HBE, ABE, NABE or FBE). Monthly participation reports shall be submitted to the EBO officer. Bidders awarded contracts on eligible projects shall maintain participation reports for a period of two years after the completion of the applicable contract or project. All bidders shall create and maintain, for a minimum of two years all records and documents reasonably necessary to demonstrate and verify the bidder's compliance with the requirements of this Order. Upon request by the EBO officer, a bidder shall either submit such documents to the division of equal business opportunity or permit inspection of such documents as are requested by EBO officer to verify compliance with the requirements of this Order.

Failure to meet equal business opportunity participation goals.

A determination by the equal business opportunity officer that the contractor has failed to comply with any portion of this Order, as herein provided and described, shall subject the offending party to any or all of the following penalties:

- (1) Withholding from the contractor in violation ten percent of all future payments under the involved eligible project until it is determined that the contractor is in compliance;
- (2) Withholding from the contractor in violation all future payments under the involved eligible project until it is determined that the contractor is in compliance;

- (3) Refusal of all future bids or offers for any eligible project with the City of Jackson or any of its departments or divisions until such time as the contractor demonstrates that there has been established and there shall be carried out all of the provisions of this Order;
- (4) Cancellation of the eligible project.

Equal business opportunity certification.

- (a) Standards: The division of business development shall determine the eligibility of AABEs, HBEs, ABEs, and FBEs for participation in city eligible projects according to the following standards:
 - (1) Bona fide minority (African American, Hispanic, or Asian American) group memberships shall be established on the basis of the individual's claim that he or she is a minority (African American, Hispanic, or Asian American) and is so regarded by that particular minority community.
 - (2) An eligible MBE (AABE, HBE, or ABE) and FBE under this program shall be a viable, independent and continuing operation for profit, performing a commercially useful function which is owned and controlled by one or more minority persons or females respectively. The ownership and control by minorities or females shall be real and substantial, and shall be indicated by customary incidents of ownership, as demonstrated by an examination of the substance rather than the form of ownership and operating arrangements.
 - (3) The minority or female owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day decisions, as well as any decisions on matters of management, policy and operations on a full time basis. The business shall not be subject to any formal or informal restrictions which limit the customary discretion of the minority or female owners. There shall be no restrictions by partnership agreements, charter requirements or other arrangements which prevent the minority and female owners from making a business decision without the cooperation or vote of any owner who is not minority or female.
 - (4) In such instance where the actual management of an MBE or FBE is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purposes of this Order, be considered as controlling the business.
 - (5) All securities which constitute ownership or control of an entity for purposes of establishing it as an MBE or FBE must be held directly by minority or female individuals. No securities held in trust or by any guardian for a minor shall be considered held by minorities or females in determining the ownership or control of a corporation.
 - (6) Ownership and control shall be measured as though not subject to the community property interest of a spouse if both spouses certify that: (i) only one spouse participates in the management of the business; (ii) community property interest in the subject business.
- (b) Certification investigation: The division of business development shall investigate MBE (AABE, HBE, or ABE) and FBE ownership arrangements beyond formal documents submitted by such entities if:
 - (1) The business is applying for certification with the city for the first time;
 - (2) The business is newly formed or the firm has minority and/or female ownership of less than 100 percent;
 - (3) There is a previous or continuing employer-employee relationship between or among present owners;
 - (4) A business which is not an MBE and FBE has an interest in such entity;
 - (5) The ownership of the business has changed since documents have been submitted to the division of business development;

- (6) A review of the documents submitted with the application raises serious concerns regarding either ownership or control of the business; and/or
- (7) The manager of the business development division deems it appropriate.
- (c) Period: The division of business development shall grant certification to an approved MBE (AABE, HBE, or ABE) or FBE for a period of one year.
- (d) Denial: If an MBE or FBE is denied certification on the basis of information submitted, the company cannot reapply for certification for a period of six months from the date of the notice of denial, provided that such company shall have the right to appeal such denial and to be certified if such appeal is decided in its favor. Upon denial of certification as an MBE or FBE, the chair of the EBORC shall notify the affected party in writing, via certified mail, setting forth the reasons for the denial of certification.
- (e) Application for certification: AABEs, HBEs, ABEs NABEs or FBEs who wish to be certified as such by the division of the business development must submit a written certification application on a form approved and provided by the division of the business development. The manager of division of the business development may, in his or her discretion, deny certification to applicants who fail to promptly submit necessary documentation or fail to complete the application process within a reasonable period.
- (f) Re-certification: To remain certified, all MBEs and FBEs appearing in the certification database will be required to submit a new affidavit with required documentation annually.
- (1) The MBE or FBE will submit the completed disclosure affidavit with the required documentation to the division of business development.
 - (2) The disclosure affidavit and related documents will be evaluated for completeness and accuracy to determine whether changes that have occurred affect the status of the business as a bona fide MBE or FBE. An investigation may be conducted to evaluate an applicant as deemed appropriate.
 - (3) All certified MBEs or FBEs are subject to monitoring by the division of business development to assure that the appropriate ownership and control will continue.
- (g) Decertification: The division of business development may decertify a business that it finds is not longer a bona fide MBE (AABE, HBE, or ABE) or FBE. Any of the following reasons, which are not intended to be all-inclusive, are sufficient grounds for decertification:
- (1) The entity has changed to the extent that the business no longer satisfies the requirements of ownership and/or control;
 - (2) The MBE or FBE fails to submit within a reasonable time period information requested by the equal business opportunity officer or the division of business development. Businesses decertified for reasons other than by voluntary request may not apply for re-certification for such time as may be specified, up to one year. A business that is decertified may file an appeal as specified below.
- (h) Continuing duty: Certified MBEs and FBEs shall be under a continuing duty to inform the division of business development in writing of any changes in the MBEs' or FBEs' business if, as a result of such changes, the MBE or FBE no longer satisfies the requirements of paragraph (a) of this Order.

Appeals.

- (a) Determination of noncompliance and denial of certification: Upon a determination of noncompliance with the requirements of this Order by the equal business opportunity officer or a denial of certification as an MBE (AABE, HBE, or ABE) or FBE by the division of business

development, the deputy of the office of economic development (chairperson of the EBORC) shall notify the affected party in writing by registered mail, setting forth the reasons for the determination of noncompliance or denial of certification.

- (b) Time for filing notice of appeal: Any bidder who has been denied certification as an MBE or FBE by the division of business development or against whom a determination of noncompliance with the requirements of this Order has been found by the division of equal business opportunity, may appeal the determination of noncompliance or denial of certification by filing a notice of appeal with the deputy of the office of economic development in writing within seven working days of receipt of the notice of the determination of noncompliance or denial of certification.

The deputy of the office of economic development shall have the authority to approve, alter, or reverse, the determination of noncompliance, or denial of certification. The deputy director of the office of economic development shall have two working days in which to make his/her decision. If the determination of denial is upheld, or should the affected party be dissatisfied with the decision of the deputy director, then the affected party may request that an appeal hearing be held by the EBORC. This request must be made in writing within three working days of receipt of the decision of the deputy director.

- (c) Notice of hearing date and hearing: Upon receipt of the notice of appeal from the aggrieved party by the deputy of the office of economic development, such deputy director shall forward the notice to the EBORC. No awards will be made pending the final decision of any appeal requested by the bidder having the lowest and best bid, as determined and recommended by the department. The decision of the EBORC is final.
- (d) The appellate duties of the equal business opportunity review committee (EBORC) shall be as follows:
 - (1) The EBORC shall set a hearing date not more than ten working days from the date of receipt of the notice from the deputy director of the office of economic development. The committee shall cause notice of the hearing to be served upon all parties, by registered mail. Such notice shall set forth with particularity the charges filed by the aggrieved business and shall include the hearing date, time and place.
 - (2) At the hearing, all parties shall be provided a fair and impartial hearing and shall be allowed to produce any and all evidence in either party's possession concerning the determination of noncompliance with the requirements of this Order or the denial of certification as an MBE (AABE, HBE, or ABE) or FBE.
- (e) Decision: The equal business opportunity review committee shall, within seven working days (excluding official holidays) after the conclusion of the hearing, make a written decision on the appeal, which decision shall affirm, alter or reverse the determination of noncompliance or the denial of certification. The committee shall decide whether the determination of non-compliance being appealed was in accordance with the law and the terms and conditions of the solicitation before the contract is awarded or penalties are imposed. If the EBORC finds for the aggrieved party, as appropriate, the business shall be certified as an MBE or FBE and added to the certification database maintained by the city or the business shall be found in compliance with the EBO requirements of this Order and their respective bid or proposal may be considered for an award in response to the city's solicitation. The decision of the EBORC shall be binding on all parties, subject to the right of appeal as provided by law.
- (f) Notice of decision: The equal business opportunity review committee shall issue written notice of the decision on the appeal to all parties within seven working days (excluding official holidays) after the conclusion of the hearing. The notice of the decision shall be sent to all parties by registered mail and shall set forth the reasons for the decision.

Race neutral assistance program.

The City of Jackson recognizes that race-neutral alternatives such as bonding assistance, technical and financial aid are instrumental in helping African American, Hispanic, Asian American and female businesses overcome the effects of past public and private discrimination in the Jackson business market. This discrimination has affected the capacity and ability of minority and female businesses to compete in the Jackson business sector with non-minority, non-female owned businesses that have greater access to bonding and financial assistance. The city further recognizes that small businesses, limited in size and capital suffered similar difficulties in competing for contract dollars in public and private markets. It is in the city's best interest to promote opportunities in purchasing and contracting for small business enterprises, minority business enterprises and female business enterprises in doing business with the city.

- (1) Bonding assistance. The division of equal business opportunity shall develop a program or enter into an agreement with agencies or organizations that have programs to assist small business enterprises (SBEs) in obtaining information and resources in the availability of bonding for public sector contracts. This division, alone or in partnership with other agencies or organizations, shall provide (i) individualized counseling; (ii) conduct seminars relating to bonding; (iii) explore methods of creating a bonding program for small businesses with public and private sector resources; and (iv) monitor the bonding practices in the local market and to document any instances of discrimination in the bonding industry; and (v) provide advice and information to the construction management division or the appropriate user department as to the level of bonding generally available to subcontractors, so that such information may be considered in the process of reducing such projects to a size that small business enterprise might successfully bid.
- (2) Financial assistance. The division of equal business opportunity will assist small business enterprises in locating available financial resources in the Jackson business sector. This division, alone or in partnership with other agencies/or organizations, shall act as a: (i) clearinghouse for information on financial assistance programs for SBEs; (ii) assist in packaging loan requests for SBEs; (iii) conduct seminars related to financing; (iv) monitor and document any instances of discrimination against SBEs, MBEs and FBEs; and (v) explore public and private resources to provide financial services to small business enterprises.
- (3) Construction management and technical assistance. The division of equal business opportunity, alone or in partnership with other agencies or organizations, will offer services to assist small business enterprises in construction management and technical services. This will be facilitated by: (i) assisting SBEs with bidding and estimating on construction contracts; (ii) conducting seminars on construction management; (iii) assisting the equal business opportunity officer in identifying and solving technical problems on construction projects; (iv) providing information on construction assistance programs; and (v) documenting any identified discrimination against SBEs, MBEs or FBEs on construction projects.
- (4) Prohibition against discrimination in awarding subcontracts due to bonding.
 - a. The prime contractor shall be prohibited from denying a subcontract solely on the basis of that subcontractor's inability to obtain any payment and performance bond required by the contractor. The EBORC, in consultation with the equal business opportunity officer, shall adopt rules and regulations to implement the following policy:
 1. The encouragement of prime contractors to accept increment bonding for subcontractors;

2. The encouragement of the prime contractor to accept the maximum bond that the subcontractor can provide for the job, in circumstances where the subcontractor cannot provide a bond to cover the total amount of the subcontract;
 3. The encouragement of the prime contractor to waive bonding requirements when feasible for subcontractors.
 - b. The prime contractor shall be required to submit a bonding assistance program for small, minority and female businesses on all wrap-up insurance contracts on eligible projects which exceed \$5,000,000.00.
- (5) Subcontractor payment certification. Every contract by the city for the performance of work shall contain a provision requiring the prime contractor to certify in writing that all subcontractors and suppliers have been paid for work and materials from previous progress payments received (less any retainage) by the prime contractor prior to receipt of any further progress payments. In the event a contractor is unable to pay subcontractors or suppliers until it has received a progress payment from the city, the prime contractor shall pay all subcontractors or suppliers funds due from said progress payments within 48 hours of receipt of payment from the city. During the contract and upon completion of the contract, the city may request documentation to certify payment to subcontractors or suppliers. The city reserves the right to issue joint checks payable to both the contractor and the subcontractor to insure proper payments. This provision in no way creates any contractual relationship between any subcontractor and the city or any liability on the city for the contractor's failure to make timely payment to the subcontractor.

ORDERED, this the 1st day of April, 2011.


HARVEY JOHNSON, JR., MAYOR